(1) Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

DENISE DEBOSE and JAMES MCCULLOUGH,

Petitioners

UNITED STATES OF AMERICA,

Intervenor

vs.

STATE OF NEBRASKA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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4088

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QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165 (1994 and Supp. III 1997), is a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

PARTIES TO THE PROCEEDING

James McCullough and Denise DeBose, Petitioners

The United States, Intervenor

vs.

State of Nebraska, Respondent

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The panel decision of the Court of Appeals for the Eighth Circuit is reported at ___ F.3d ___ (8th Cir. 8-9-99, amended 9-14-99). (Appendix A). The Court denied a hearing *en banc* (Appendix B). The District Court's memorandum and order is not reported.

JURISDICTION

A jury trial was held on the Petitioners' claims of job discrimination pursuant to the Americans With Disabilities Act with a verdict for said Petitioners in August of 1997. The issue of sovereign immunity was not addressed by the trial court and was raised for the first time on appeal. The Respondent filed a timely appeal to the United States Court of Appeals for the Eighth Circuit. The United States intervened in the Eighth Circuit to defend the constitutionality of the ADA pursuant to 28 U.S.C. § 2403(a). A panel of the Eighth Circuit reversed the District Court's judgment for the Petitioners relying on the Eighth Circuit's holding in Alsbrook v. City of Maumelle, Arkansas, et al., 184 F.3d 999 (8th Cir. 7-23-

99) which held that the State is immune from suit. In particular, the Eighth Circuit held that extension of Title I of the ADA to the State exceeds Congress's authority under § 5 of the Fourteenth Amendment. The Eighth Circuit's decision was filed on August 9, 1999, and was amended on September 14, 1999. Pursuant to Supreme Court Rule 13.3, this Petition was filed within ninety days of the decision of the Eighth Circuit. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Eighth Circuit pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded upon 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101

(a) Findings

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the

discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society based on characteristics that are beyond the control of such individuals and resulting from

stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

* * * *

42 U.S.C. § 12101

(b) Purpose

It is the purpose of this chapter –

(l) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and,

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12111

As used in this title:

(1) Commission. The term Commission, means the Equal Employment Opportunity Commission established by Section 705 of the Civil Rights Act

of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term covered entity means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term direct threat means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term employee, means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such

person, except that for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term employer does not include–

(I) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs.

(A) In general. The term illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances

Act (21 USCS § 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 USCS § 812).

(7) Person, etc. The terms person, labor organization, employment agency, commerce and industry affecting commerce, shall have the same meaning given such terms in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes

of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term reasonable accommodation may include---

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term undue hardship means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(I) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the

covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

* * * *

42 U.S.C. § 12202

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term discriminate includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the

accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

* * * *

STATEMENT OF THE CASE

The Petitioners, James McCullough and Denise DeBose filed separate actions against the State of Nebraska in the U.S. District Court for the District of Nebraska. The two cases have been consolidated for all purposes (e.g.: trial and appeal). Both Petitioners alleged that the Respondent violated Title I of the ADA by terminating their employment as investigators from the Nebraska Equal Opportunity Commission (NEOC). The

NEOC is the State agency charged with investigating charges of discrimination against employers.

Mr. McCullough and Ms. DeBose had been employed as investigators with the NEOC for many years. Both suffered from mental disabilities, clinical depression. The State stipulated that each suffered from clinical depression, but denied that said depression was a disability. At no time until the appeal to the Eighth Circuit did the Respondent raise the sovereign immunity issue.

The Petitioners were terminated from their employment and argued two violations of the ADA. The first was that they were treated differently than similarly situated investigators because of their disability. Second, that they did not receive reasonable accommodation of their disabilities. A jury awarded the Plaintiffs back pay and emotional distress damages. The Court entered an order reinstating Ms. DeBose, $30,743.20 in back wages and benefits, and $46,000 in compensatory damages, and awarded Mr. McCullough $54,671.70 in back wages and

benefits and $46,000 in compensatory damages, as well as $95,790.00 in front pay in lieu of reinstatement. The Court also awarded the Plaintiffs attorney fees of $20,201.75 and costs of $1,347.24. The total judgment on behalf of both Plaintiffs was in the amount of $294,753.89. The Respondent appealed alleging that their F.R.Civ.P. 50 motions were improperly denied and that the State was immune from suit.

The United States of America intervened pursuant to 28 U.S.C. § 2403(a) as a plaintiff on appeal to defend the constitutionality of the ADA. A panel of the Eighth Circuit reversed the judgment of the District Court, citing its holding in Alsbrook v. City of Maumelle, Arkansas, et al., 184 F.3d 999 (8th Cir. July 23, 1999). Petitioners filed a timely Motion for Rehearing *En Banc* which was denied on August 9, 1999 and the panel decision was amended on September 14, 1999.

The Petitioners seek a Petition for Writ of Certiorari from this Court to review the decision of the Eighth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

REASON 1

A Split Exists In The Circuits With Respect To The Issue Of Whether The ADA Properly Abrogates Eleventh Amendment Immunity.

Rule 10(a) of the Rules of this Court state that among other reasons the Court considers in granting a writ of certiorari is that a United States Court of Appeals has entered a decision in conflict with decisions of other United States Court of Appeals on the same important matter. In the instant case, the Eighth Circuit held:

> In Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 7-23-99) (*en banc*), slip op. at 18, we held that Congress lacked the power to abrogate a state's eleventh amendment immunity relative to Title II of the Americans With Disabilities Act, *see* 42 U.S.C. §§ 12131-12165. We think that the principles established in that case apply with equal vigor to Title I of that act, *see*

> 42 U.S.C. §§ 12111-12117. We therefore reverse the judgment of the district court and remand the case for the entry of judgment in favor of the Defendant.

In Alsbrook, supra, the Eighth Circuit stated:

> In sum, it cannot be said that in applying Title II of the ADA to the States, Congress has acted to enforce equal protection guarantees for the disabled as they have been defined by the Supreme Court. We find, therefore, that the extension of Title II of the ADA to the States was not a proper exercise of Congress power under § 5 of the Fourteenth Amendment. Consequently, there is no valid abrogation of Arkansas's Eleventh Amendment immunity from private suit in Federal Court and the District Court lacked subject matter jurisdiction over the ADA claim.

Alsbrook v. City of Maumelle, – 184 F.3d 999 (8th Cir. 7-23-99).

The decision of the Eighth Circuit is in direct conflict with the decisions of several other circuits. The Court of Appeals for the Fourth Circuit in Amos v. Maryland Dept. of Public Safety, 178 F.3d 212, 223 (1999) stated "[W]e rule that the State of Maryland's sovereign immunity has been validly abrogated and the State is subject to suit in this case." Id. The Court went on to state "[W]e find that application of the ADA . . . to state prisons is a valid exercise of Congress legislative powers under § 5 of the Fourteenth Amendment and that the Appellees are validly subject to suit under these statutes." Id.

In Kimel v. State of Florida Bd. of Regents, 139 F.3d 14267 (11th Cir. 1998), cert granted (on separate issue), 119 S. Ct. 901,902 (1999), the Court stated:

> . . . [I]t is plain that Congress was invoking its Fourteenth Amendment enforcement powers when it enacted the ADA. *See* 42 U.S.C. § 12101 (b) (it is the purpose of this chapter . . . (4) to invoke the sweep of

> congressional authority, including the power to enforce the fourteenth amendment . . .) Congress specifically found that individuals with restrictions and limitations subjected to a history of purposeful unequal treatment 42 U.S.C. § 12101(a)(7). We accept Congress's analysis of the situation addressed by the ADA and agree with the courts that have addressed the issue: the ADA was properly enacted under Congress's Fourteenth Amendment enforcement powers.

Kimel v. State of Florida, Bd. of Regents, supra, 139 F.3d at 1433.

In Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997), the Court held, "we therefore agree with the District Court that both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment." Id.

The Fifth Circuit Court of Appeals also held that

the immunity of a state was properly abrogated by Congress under its Fourteenth Amendment powers in enacting the ADA. See Coolbaugh v. Louisiana, 136 F.3d 430 (1998).

Additionally, the Seventh Circuit in Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 487 (1997), found that Congress properly abrogated the Eleventh Amendment immunity of the State's pursuit under the ADA as a proper exercise of Congress' authority to enforce the Fourteenth Amendment.

The Second Circuit Court of Appeals has recently upheld the ADA as a valid exercise of Congress' authority to enforce the Fourteenth Amendment. See Muller v. Constello, — F.3d — 1999 WL 599285 (2nd Cir. August 11, 1999).

The Eleventh Circuit Court of Appeals upheld the Act in Seaborn v. Florida, 143 F.3d 1405 (11th Cir. 1998), cert den., 119 S.Ct. 1038 (1999).

Further, the Fourth Circuit Court of Appeals also held in favor of the constitutionality of the ADA in Amos

v. Maryland Dept. of Pub. Safety and Correctional Servs., 178 F.3d 212 (4th Cir.1999).

Finally, in Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 6 n.7 (1st Cir. 1999), the Court held: "We have considered the issue of Congress's authority sufficiently to conclude that were we to confront the question head on, we almost certainly would join the majority of Courts upholding the provision."

The Eighth Circuit's decision is in direct conflict with the rulings of these Courts. Moreover, three Courts of Appeals have considered or reconsidered the validity of the ADA's abrogation after the Eighth Circuit's decision in Alsbrook. See: Dare v. California, No. 97-56065; 1999 WL 717724 (9th Cir. Sept. 16, 1999); Martin v. Kansas, No. 98-3102, 1999 WL 63 5916 (10th Cir. Aug. 19, 1999); and Muller v. Constello, No. 98-7491, 1999 WL 599285 (2nd Cir. Aug. 11, 1999).

The question of Congress' authority is now in direct conflict in the Circuits after exhaustive review by those Courts. Thus, the conflict is incapable of resolution

absent a decision by this Court.

REASON 2

The Eighth Circuit's Opinion Conflicts With a Decision of this Court.

Rule 10(c) of this Court states that the Court may grant the petition if it conflicts with relevant decisions of this Court. The Eighth Circuit's opinion directly conflicts with this Court's decision in Olmstead, Comm. Georgia, Dept. of Human Resources, et al. v. L.C., ___ U.S. ____ (June 22, 1999).

In Olmstead this Court held that Title II of the Americans With Disabilities Act required the States to provide community based treatment for persons with mental disabilities when the placement can be reasonably accommodated. Citing 28 CFR § 41.53 (1990 and 1998 eds): "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

Although no constitutional, jurisdictional issue was decided, one can assume that this Court is well aware of the Eleventh Amendment immunity argument and could have applied it sua sponte if it had chosen to do so.

Finally, the question presented is of broad significance to the millions of Americans who suffer discrimination in State employment because of their disabilities. The Eighth Circuit is the only Circuit where State employees and applicants for State jobs have no Federal protection against invidious discrimination. Even the Eighth Circuit in Alsbrook recognized Congress could use its power to "enforce" the Equal Protection Clause to protect people with disabilities from invidious discrimination." 1999 WL 521709 at 6. Since Title I is of more limited scope than Title II, this Court should grant the Petition to define the difference between the two sections. Title I is limited to employment decisions, not to the very many public programs addressed in Title II. Congress clearly found that disability discrimination existed in employment (see H.R. Rep. No. 485, Pt 2, 101st

Cong. 2nd Sess. 71 (1990) (House Report). A survey of State officials by the Advisory Commission on Intergovernmental Relations (ACIR) prior to the enactment of the ADA reported that 35% identified "negative attitudes about persons with disabilities" as a "serious impediment" to employment persons with disabilities in State government, and another 48% described them as a "moderate" impediment. ACIR, supra, at 73. But as the Court explained in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985), "mere negative attitudes . . . are not permissible bases" for making legitimate government decisions. Thus, with the extensive evidence of negative employer attitudes in general, and government employer attitudes specifically, Congress had a strong basis in fact for determining that States were acting in an unconstitutional manner when it came to employing persons with disabilities. Congress' conclusion that public employers engage in the same discrimination as private employers is consistent with its coverage of public employers under

Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. "The ADA targets particular practices – in this case, discrimination in employment – and provides a remedy following the time tested model provided by the anti-employment discrimination provisions of Title VII of the Civil Rights Act of 1964." Muller v. Constello, 1999 WL 599285 (2nd Cir. Aug.11,1999).

CONCLUSION

To resolve the conflicts among the Circuit Courts, this Court, and the Eighth Circuit, this Court is urged to grant the Petition.

Respectfully submitted,

DENISE DEBOSE AND JAMES MCCULLOUGH, Petitioners

By _____

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APPENDIX A

FOR PUBLICATION

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3541

Denise DeBose,	*
	*
Appellee, and	*
	*
United States of America,	*
	*
Intervenor on Appeal,	*
	*
v.	*
	*
State of Nebraska,	* Appeal from
	* the United
	* States District
	* Court for the
	* District of
	* Nebraska

No. 97-3544

James McCullough,

Appellee, and

United States of America,

Intervenor on Appeal,

v.

State of Nebraska,

Appellant.

Submitted: April 15, 1998

Filed: August 9, 1999

Before WOLLMAN, Chief Judge, and BEAM and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The Nebraska Equal Opportunity Commission (NEOC) fired two of its case investigators, Denise DeBose and James McCullough, because, the NEOC says, they repeatedly and grossly failed to meet their case quotas and performed their work in an untimely fashion. Both Ms. DeBose and Mr. McCullough claim to suffer from clinical depression, and they maintain that their unsatisfactory work performance was due to their disability. They therefore filed suit against the NEOC, alleging that it had violated the Americans with Disabilities Act (ADA), see 42 U.S.C. §§ 12101-12213, in terminating them.

A jury awarded a total of more than $175,000 in back wages and compensatory damages to the plaintiffs and nearly $100,000 in front pay to Mr. McCullough, and the district court ordered that Ms. DeBose be reinstated to her job. The State of Nebraska argues that the district court erred in holding that the state was not immune from suit under the Eleventh Amendment of the U.S.

Constitution and in denying the State's motions for judgment as a matter of law.

In Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 7-23-99) (*en banc*), slip op. at 18, we held that Congress lacked the power to abrogate a State's eleventh amendment immunity relative to Title II of the Americans with Disabilities Act, see 42 U.S.C. §§ 12131-12165. We think that the principles established in that case apply with equal vigor to Title I of that act, *see* 42 U.S.C. §§ 12111-12117. We therefore reverse the judgment of the district court and remand the case for the entry of judgment in favor of the defendant.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3541 / 3544NEL

Denise DeBose, et al.	*	
	*	
Appellees,	*	
	*	
vs.	*	Order Denying Petition
	*	for Rehearing and for
State of Nebraska,	*	Rehearing En Banc
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

September 14, 1999

Order Entered at the Direction of the Court:
"s/_____"
Clerk, U.S. Court of Appeals, Eighth Circuit